No. 76-1203

Supreme Court, U. S.
FILED
JUN 1 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY FOR REA EXPRESS, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(1) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the appeal be dismissed for lack of jurisdiction, or, if the Court determines that it has jurisdiction, that the decision of the district court be affirmed.

STATEMENT

REA Express, Inc. was formed in 1929, when 86 of the nation's railroads received approval from the Interstate Commerce Commission, pursuant to 49 U.S.C. 5(2), to purchase the assets of American Railway Express Company. *Securities and Acquisition of Control of Ry. Exp. Agency*, 150 I.C.C. 423. The Commission simultaneously approved, pursuant to 49 U.S.C. 5(1), the "pooling" provisions of the Standard Express Operating Agreement (SEOA), which REA proposed to execute with all railroads

carrying freight for it. The SEOA designated REA as the railroads' exclusive express agent and provided that REA would operate as a non-profit joint venture. REA's expenses were to be deducted from gross revenues, and the remaining funds (termed "rail transportation revenue") were to be distributed to the railroads in proportion to the rail transportation provided. See J.S. App. 2a-3a, 46a-54a.

REA financed the purchase of American's assets by issuing $32 million of bonds to the public. The railroads originally planned to deposit a portion of the revenue that otherwise would be distributed to the railroads into a sinking fund, which would be used to retire the bonds. But not all of the railroads had equity investments in REA, and the non-equity railroads objected to the sinking fund arrangement because the method of contribution would build up the value of the equity investments at the expense of the non-equity railroads (J.S. App. 3a-4a).

On April 11, 1929, REA's Board of Directors adopted a resolution directing that a fixed amount per share be deducted from the rail transportation revenues due each railroad with an equity interest in REA, and that such amounts be credited as "advances" to REA. The advances, which were used to retire the bonds, were listed on REA's books as "Non-negotiable debt to affiliated companies—Advances," and REA paid interest on them at the rate of 5 1/4 percent (J.S. App. 62a).

In 1959 a new operating arrangement was adopted. REA compensated the railroads for their services on an out-of-pocket basis. The debt for "advances" by shareholder railroads was replaced by 5 percent promissory notes totalling $27.6 million.[1] The Commission approved the new

[1]The notes were to mature on December 13, 1973. Unlike the former debt, which was wholly subordinated to other creditors, the notes were subordinated only to certain existing REA fixed debt (J.S. App. 4a).

arrangement as a "pooling agreement," pursuant to Section 5(1) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5(1) (see J.S. App. 78a). Four days later the Commission issued an order approving the issuance of the promissory notes, pursuant to Section 20a(2) of that Act, 49 U.S.C. 20a(2) (J.S. App. 97a-99a).

REA experienced poor earnings during the next several years, and the railroads endeavored to find a purchaser for their interests. In 1969 a group of REA executives formed the REA Holding Company, which purchased the railroads' REA stock for $2 million and warrants in the holding company (J.S. App. 5a).

REA continued to make interest payments on the notes until September 1971, when it filed suit against its former owners in the United States District Court for the Southern District of New York. REA challenged the validity of the notes and sought to recover damages; it argued, *inter alia*, that the creation of the non-negotiable debt and the issuance of the 1959 notes violated the competitive bidding requirement of Section 10 of the Clayton Act, 38 Stat. 734, 15 U.S.C. 20. The district court dismissed the portions of the REA complaint attacking the issuance of the 1959 notes on the ground that the complaint was a collateral attack on the Commission's order approving issuance of the notes. *REA Express, Inc.* v. *Alabama Great Southern Railroad*, 343 F. Supp. 851.

REA then filed an amended complaint; a three-judge court was convened. The Commission moved to stay the proceeding until it had reconsidered its 1959 approval of the notes. The district court granted that motion (J.S. App. 6a-7a).[2]

[2]REA asked the three-judge court to enjoin the Commission's proceeding. That court declined to do so, and this Court affirmed. *REA Express, Inc.* v. *Alabama Great Southern Railroad*, 412 U.S. 934.

The Commission concluded that its 1959 order "was correctly and appropriately issued" (J.S. App. 96a) and that the issuance of the notes had been exempted from the operation of the antitrust laws pursuant to the express immunity provision of Section 5(11) of the Interstate Commerce Act, 49 U.S.C. 5(11) (J.S. App. 41a-96a). REA's petition for reconsideration was denied by the Commission on February 11, 1976 (J.S. App. 108a-110a), and REA then filed petitions for review of the latest Commission orders in both the district court and the court of appeals.

The three-judge district court sustained the Commission's orders (427 F. Supp. 1157; J.S. App. 1a-34a). That court concluded that Section 10 of the Clayton Act is not applicable to the creation of the non-negotiable debt or the 1959 conversion of the debt to promissory notes, because that Section does not cover transactions between a carrier and all of its stockholders (J.S. App. 28a-30a). The court also concluded that the Commission did not err in approving issuance of the notes under Section 20a of the Interstate Commerce Act. The court said that "REA's argument amounts to condemnation by hindsight" and that REA "simply has not demonstrated a relation between the 1959 notes and its current financial plight sufficient to require a conclusion that the Commission erred either in 1959 in approving the notes or more recently in refusing to reverse that authorization" (J.S. App. 30a-32a). In light of its conclusion the court found it unnecessary to reach a number of other defenses raised by the United States and the Commission (J.S. App. 10a).[3]

[3]The district court concluded (J.S. App. 9a-10a) that it had jurisdiction of the case insofar as REA was challenging the Commission's orders. Out of an abundance of caution, however, the three judges also entered an order, as a panel of the court of appeals, dismissing REA's petitions for review (550 F. 2d 1342; J.S. App. 35a-36a).

ARGUMENT

1. The appeal should be dismissed for want of jurisdiction. The three-judge district court's decision has not brought this suit to a close. Several other matters, including additional claims and counterclaims, remain to be resolved. See J.S. App. 33a-34a. Consequently, there is no final judgment from which an appeal may be taken (see *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737). The district court has not entered a separate judgment pursuant to Fed. R. Civ. P. 54(b) to allow an immediate appeal; indeed, the district court has not entered a judgment of any sort, and the lack of a judgment, quite apart from the interlocutory nature of the district court's decision, precludes any appeal. Fed. R. Civ. P. 58; *United States* v. *Indrelunas*, 411 U.S. 216.

The railroad appellees apparently believe that the district court's order is appealable as the denial of an interlocutory injunction, without respect to the difficulties discussed above (Mot. to Affirm 8 n. 8). But appellant did not seek an injunction against the Commission's 1959 order; it sought, instead, an order setting aside the Commission's decision. Although orders "setting aside" a decision of the Commission could be appealed directly to this Court prior to the passage of Pub. L. 93-584, 88 Stat. 1917 (see generally *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 309-310 n. 12), a request for such an order is not a request for an injunction, since it does not request coercive relief and does not request the Commission to do anything. The denial of a request to set aside a Commission decision therefore should not be appealable until the litigation has been finally concluded and a judgment has been entered.

Although the opinion of the three-judge district court therefore is not yet appealable, all issues with respect to the validity of the Commission's orders have been finally

determined (see J.S. App. 33a-34a), and the petition for review filed in the court of appeals has been disposed of (see *id.* at 35a-36a). If the case were properly in the court of appeals, that court's order could be reviewed by certiorari, as appellant has requested (J.S. 2-3). It is unnecessary to consider the effect of appellant's failure to file a separate petition for a writ of certiorari, however, because the district court correctly determined that it had jurisdiction (J.S. App. 9a-10a).

The decision of the Commission primarily complained of was rendered in 1959, and the amended complaint challenging that decision was filed in 1972. Because actions filed in three-judge district courts prior to March 1, 1975, may continue to be heard by those courts, and may be appealed to this Court, the court of appeals had no jurisdiction of this case. *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500, 501-502 and n. 1. Although the Commission declined in 1975 to reverse its 1959 decision, the 1975 decision did not inflict a separate cognizable injury upon appellant; at most, the court of appeals would have authority to review the Commission's 1975 decision.

But appellant does not contend that the Commission was required, in 1975, to reverse its 1959 decision if the 1959 decision was correct. The only legal issues presented by this case therefore deal with the propriety of the 1959 decision, and those were placed before the three-judge district court prior to March 1, 1975.

2. If the Court concludes that it has jurisdiction of this case by appeal from the three-judge district court, then we submit that it should affirm the decision of that court. If the Court concludes that it has jurisdiction under 28 U.S.C. 1254(1) and 2103 to consider the jurisdictional statement as a pétition for a writ of certiorari to the court of appeals, then we submit that it should deny the petition. We rely upon the thorough opinion of the district court.

a. Appellant advances several arguments against the validity of the Commission's action with respect to the 1959 notes.[4] Appellant's major argument is that the 1959 transactions violated Section 10 of the Clayton Act, 15 U.S.C. 20, which prohibits carriers from dealing without competitive bidding in the securities of other firms with which the carriers share interlocking boards of directors. But the district court properly concluded (J.S. App. 14a-16a, 28a-30a) that Section 10 does not pertain to transactions between carriers and their wholly-owned subsidiaries.

This Court has described Section 10 as "a rather narrow prohibition applicable to activity which is conceptually within the antitrust philosophy." *United States* v. *Boston & Maine Railroad*, 380 U.S. 157, 162. The statute was designed primarily to protect a carrier against abuse caused "by palming off on it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors" (*Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 190). It is a criminal statute, and its prohibitions are to be "construed strictly, not loosely." *United States* v. *Boston & Maine Railroad, supra*, 380 U.S. at 160.

The transactions appellant challenges could not have produced the evil at which the statute was directed. Dealings between railroads and their subsidiaries could not defraud the railroad or harm minority stockholders. Nothing in the legislative history of Section 10 indicates that it applies to

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[4]Appellant apparently has abandoned the arguments he made in the district court with respect to the validity of the organization of RFA, the creation of the sinking fund, and the treatment of contributions to the sinking fund as non-negotiable debt payable on demand.

securities transactions between a carrier and all of its owners. The cases are unanimous that it does not. In addition to the present decision, see *Cleary* v. *Chalk*, 488 F. 2d 1315 (C.A. D.C.), certiorari denied, 416 U.S. 938; cf. *Klinger* v. *Baltimore & Ohio R.R.*, 432 F. 2d 506 (C.A. 2).

Minneapolis & St. Louis R. Co. v. *United States, supra,* upon which appellant relies (J.S. 14), does not assist him. This Court's statement that Section 10 may have been intended "to cover only a carrier's dealing with related persons in its own securities" (361 U.S. at 190-191 n. 13) does not imply that Congress intended to cover parent-subsidiary transactions.

Even if Section 10 applies to the issuance of the 1959 notes, the Commission's approval of the note issuance in conjunction with its approval of the 1959 operating agreement exempted the carriers from Section 10. *Minneapolis & St. Louis R. Co.* v. *United States, supra,* 361 U.S. at 186. Section 5(11) of the Interstate Commerce Act grants the Commission power to approve pooling agreements, such as the express operating agreement, and it relieves carriers from antitrust law constraints "insofar as may be necessary to enable them to carry into effect the transaction so approved." The issuance of the notes was an integral part of the 1959 restructuring of REA, and the concurrent approvals by the Commission were a single determination with respect to one substantive transaction (J.S. App. 96a, 97a-99a). See *Walker* v. *United States*, 208 F. Supp. 388 (W.D. Tex.), affirmed, 372 U.S. 526.

b. Appellant asserts that the Commission erred in approving the 1959 notes under 49 U.S.C. 20a(2). Section 20a(2) authorizes the Commission to approve the issuance of securities if it finds that the issuance is "(a) for some lawful object within its corporate purposes, and compatible

with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." The Commission made precisely those findings in its 1959 order (J.S. App. 92a-99a).

The Commission has broad discretion in making findings under Section 20a(2) (see *Walker* v. *United States, supra*), and its findings may be set aside only if they lack a rational basis. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282. Appellant has not demonstrated that the Commission acted irrationally in approving the proposal made by REA's Board of Directors, and the district court concluded that the Commission's findings were amply supported (J.S. App. 30a-32a). The notes replaced debt that was payable on demand, and they created no new indebtedness for REA. Sinking fund payments out of operating revenue were not to begin until 1965. The notes were not an undue burden on REA, and the Commission acted reasonably in approving them as part of REA's reorganization.

Denver & Rio Grande Western Railroad Co. v. *United States*, 387 U.S. 485, and *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747, cited by appellant (J.S. 16-18), do not support his assertion that the Commission should not have approved the notes. Those cases hold that potential anticompetitive consequences must be considered by federal agencies in approving the issuance of securities. Appellant, however, has not demonstrated that the substitution of promissory notes for another form of debt could produce any anticompetitive consequences. Even with the benefit of 18 years of hindsight, appellant has failed to establish any connection between the issuance of the 1959 notes and any diminution of competition.

c. Since the Commission properly approved the issuance of the 1959 notes, appellant's remaining contentions are reduced to a request that the 1959 notes be subordinated to general creditors of REA. Whether or not this request is substantial,[5] any question of subordination should be resolved in the pending bankruptcy proceeding. 3A *Collier on Bankruptcy*, para. 63.08 (1975). The priority question is not presented by the decision appellant is asking this Court to review.

CONCLUSION

The appeal should be dismissed, or, alternatively, the decision of the district court should be affirmed.

Respectfully submitted.

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JUNE 1977.

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[5] We believe that appellant's contentions are incorrect, primarily for the reasons stated by the railroad appellees at Mot. to Affirm 17-19.